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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1972

No. 71-880

EDWIN RAY HAYNES; EDWIN RAY HAYNES, NEXT FRIEND OF JON HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF MICHAEL HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF RUTH ANN HAYNES, A MINOR; JON HAYNES; MICHAEL HAYNES AND RUTH ANN HAYNES,

Appellants,

vs.

CLIFFORD EUGENE LINDER

and

HAWKEYE SECURITY INSURANCE COMPANY, a Corporation,

Appellees.

APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT AND APPENDIX

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EDWIN RAY HAYNES; EDWIN RAY HAYNES, NEXT FRIEND OF JON HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF MICHAEL HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF RUTH ANN HAYNES, A MINOR; JON HAYNES; MICHAEL HAYNES AND RUTH ANN HAYNES,

Appellants,

vs.

CLIFFORD EUGENE LINDER

and

HAWKEYE SECURITY INSURANCE COMPANY, a Corporation,

Appellees.

APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The latest opinion in this action is that of the Supreme Court of Missouri, *en Banc*, officially published at 472 S.W.2d 412 and included here as Appendix B. Earlier unpublished opinions are (Appendix G) the opinion of Division 2 of the Supreme Court of Missouri and (Appen-

dix F) the still earlier judgment entry opinion of the trial court, Division 3 of the Circuit Court for the 16th Judicial Circuit of Missouri.

GROUNDS OF JURISDICTION

This is an appeal from the final judgment of the highest state court of Missouri which applies as decisive and upholds the validity of a state statute against the contention of appellants that the statute as applied against them is repugnant to the Constitution of the United States and invalid. The appeal is brought under Title 28, Section 1257(2), United States Code.

Summoned as defendants in this equity action originated by their judgment debtor, the appellee Linder, appellants pleaded under the general rules of equity in Missouri and levied equitable garnishment on the choses in action which appellee Linder had asserted in this action against his liability insurer, appellee Hawkeye Security Insurance Company.

The Supreme Court of Missouri, *en Banc*, held (as decisive of and against appellants' claims) that although ordinarily equitable garnishment would be a proper remedy, a state statute (as newly construed and applied in the final judgment and opinion) granted liability insurers exemption and thus excluded appellants from the protection of equity.

The validity of the statute was drawn into question by appellants and the necessary effect of the final judgment applying the statute in excluding appellants from the protection of equity is a decision in favor of its validity.

Jurisdiction of this appeal is conferred on this court by Title 28, Section 1257(2), United States Code.

The judgment for which review is sought (Appendix A) was dated and entered October 11, 1971. The further order of the court (Appendix D) denying application for rehearing without opinion was dated and entered on November 8, 1971, and the judgment became final at that time. Notice of Appeal (Appendix E) was filed in the Supreme Court of Missouri on December 6, 1971.

Cases believed to sustain jurisdiction are:

State of Missouri ex rel. Missouri Insurance Co. v. *Gehner,* 281 U.S. 313, 320, 50 S.Ct. 326, 327, 74 L.Ed. 870.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U.S. 673, 677, 50 S.Ct. 451, 453, 74 L.Ed. 1107.

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 367, 53 S.Ct. 145, 149, 77 L.Ed. 360.

Poe v. *Ullman,* 367 U.S. 497, 503, 504, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989.

Tyler v. *Judges of the Court of Registration,* 179 U.S. 405, 407, 21 S.Ct. 206, 207, 45 L.Ed. 252.

Dahnke-Walker Co. v. *Bondurant,* 257 U.S. 282, 288-290, 42 S.Ct. 106, 108, 66 L.Ed. 239.

Fiske v. *State of Kansas,* 274 U.S. 380, 385, 47 S.Ct. 655, 656, 71 L.Ed. 1108.

Morey v. *Doud,* 354 U.S. 457, 464, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485.

STATUTE INVOLVED

The statute of Missouri involved is Section 379.200 R.S.Mo. 1969, which is the second section of an Act of 1925, and may be found now at page 2972, volume 3, Missouri Revised Statutes, 1969, the official edition of the Missouri statutes, and is in words and figures:

"379.200. Judgment creditor may collect insurance, when.— Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in section 379.195, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

Section 379.195, referred to in section 379.200 and which is the first section of the Act of 1925, is included as Appendix H.

QUESTIONS PRESENTED

I.

When full equitable remedy in the nature of a creditor's bill is afforded generally in Missouri to all judgment creditors who have no adequate remedy at law, enabling them to pursue full satisfaction of their judgments through equitable garnishment of their judgment debtor's choses in action, does a state statute which, without relationship to the purpose of the legislation, selects liability insurance companies to be exempt and thus excludes these appellant judgment creditors from the full protection of the otherwise available remedy of equitable garnishment, make an unlawful and arbitrary classification and exclu-

sion which constitutes invidious discrimination and denial to these appellants of equal protection of law and due process of law under the 14th Amendment to the Constitution of the United States?

II.

When the court declared as a matter of law that appellants are entitled to the insurance money provided for in the liability insurance policy and the policy is unquestioned, stipulated into evidence and before the court and unambiguously requires of the appellee insurer money payment of judgments for court costs and payment of all interest accruing on judgments until the insurance money is paid and it is judicially noted in the case that costs judgments and accrued interest remain unpaid, does the refusal of the court to award any amount on appellants' claims for unpaid costs judgments and accrued interest on their judgments constitute a denial of due process and equal protection of law under the 14th Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This action is the third round of litigation in the state courts of Missouri among these parties.

First, appellants, father and three children, seriously injured and with wife and mother killed by appellee Linder in the operation of an automobile, sued for their damages. Thereupon, appellee Hawkeye Security Insurance Co., having applicable liability insurance coverage, refused to defend or settle the damage suits and on trial, five judgments were entered against the appellee driver, Linder. Each final judgment is in excess of the insurance policy limits.

Second, the appellee insurer's policy agreements were subjected to ordinary garnishment in aid of execution by

two of these appellant judgment holders. It was solely a law proceeding with no question of equity or equitable remedy involved and under compulsion of the ensuing law judgment and after unsuccessful appeal, appellee insurer paid amounts under its policy in part payment on those two of the five judgments against its insured but still has paid nothing on the other three judgments, neither principal, interest nor costs.

Third, the appellee, insured-driver judgment-debtor, brought the present action on the equity side of the court to compel appellee insurer to pay the remaining amounts of the principal judgments, costs, interest, the expense of the defense of the damage suits and other damages caused by appellee insurer's refusal to defend. He also sought to enjoin levy by these appellants on his inadequate personal resources and to compel them to look to the appellee insurer for payment.

Appellants in turn, by counterclaims and cross-claims, levied equitable garnishment on the choses in action asserted by their judgment debtor against his insurer. Then, by money supported private agreement between appellees, appellee driver dismissed his petition and judgment went against appellants on their claims.

The final judgment and opinion of the Supreme Court of Missouri, *en Banc*, (Appendix A and Appendix B) now hold that ordinarily the equitable garnishment relied on by appellants would be a proper remedy but that appellants are excluded from its benefit because a statute of Missouri exempts liability insurance companies (and only liability insurance companies) from the full operation of the powers of equity: "As argued, there can be no doubt but that the remedy of 'equitable garnishment' is a long recognized part of the equity jurisprudence of this state, and that it serves to fill that void created when the normal

processes of law are found to be inadequate. Ordinarily, such an established principle might be asserted as the basis for the present claim presented by the Haynes. However, as must be recognized, there are now applicable statutory provisions pertaining to the critical issue in this case. * * *

"Thus, the basic question must be—after a judgment creditor has recovered from the insurer the coverage limits designated in the policy as provided in Section 379.200, should such judgment creditor then be allowed to proceed by the non-statutory procedure of equitable garnishment to recover directly from the insurer amounts, excluding interest, in excess of the money 'provided for in the contract of insurance'? As is readily apparent, the permitting of such additional recovery from the insurer by the judgment creditor would be in disregard of the statute and would necessarily result in our indirectly repealing the limitations therein. In view of the many legislative enactments regulating the operations of liability insurance carriers in this state, we are more than reluctant to ignore the monetary limitations specifically set out in Section 379.200. To hold otherwise would not be within the spirit of the statute and would contravene the apparent will of the legislature."

There is no specific language in the statute which plainly states that the statute abolishes or impairs any other existing remedy and prior judicial interpretation of the statute had found no such implication. Witness the language of the supreme court *en Banc* opinion (Appendix B) as it reviews the prior judicial constructions made of the statute: "Nor, has it been found to be an exclusive remedy, because this section did not '. . . destroy any remedy by which the insurance fund could be made available to the judgment creditor; but its purpose was to afford another remedy by which, with existing remedies,

such funds, under all conditions, might be made available and subject to the payment of his judgment.' "

The basis for claim of denial of federal rights first appeared in the opinion of the Supreme Court of Missouri, *en Banc,* in its new and unforeseen construction and application of the statute to bar previously existing equitable remedy. Appellants promptly raised the constitutional questions in their motion for rehearing. (Appendix C).

Not only had the statute never before been judicially construed to take away any other existing remedy, nor to exclude any person from the protection of equity, nor to limit the power of equity, not to exempt liability insurance companies as a class from the full power of equity, but, in this action prior to rendition of final judgment, the statute never had been suggested, argued, briefed, invoked or applied in any manner either by court or party to adversely affect appellants' claims. It was thus newly construed and applied adversely to appellants for the first time on the initiative of the Supreme Court of Missouri, *en Banc,* and not on the suggestion, presentation or urging of any party.

The chancellor in the trial court never considered the statute. The basis of his decision (Appendix F) was the lack of privity of contract between appellants and appellee insurer: ". . . the right to recovery is one in tort for damages and that right is vested in the plaintiff Linder alone . . . * * * further, that the defendants Haynes have no standing in the suit between the plaintiff Linder and the defendant Hawkeye Security Insurance Company and are not in privity with the defendant Hawkeye Security Insurance Company, and further since the plaintiff Linder has now dismissed his claims and cause of action against the defendant Hawkeye Security Insurance Company with prejudice, the defendants Haynes have no right

or cause of action to maintain against the defendant Hawkeye Security Insurance Company; * * *."

Nor did Division 2 of the Supreme Court of Missouri apply or even mention the statute in its decision affirming the trial chancellor. (Appendix G). The basis of decision in that opinion is that since Linder's choses could not be assigned at law, they could not be levied on in equity:

"In the instant case we hold that Linder's action against Hawkeye Security Insurance Company was in tort; that Linder's rights against Hawkeye Security Insurance Company, whatever they may have been, did not vest Haynes with an enforceable right against Hawkeye Security Insurance Company and were not assignable, prior to judgment, to Haynes. It therefore follows, and we hold, that Haynes did not have an equitable lien upon Linder's 'cause of action' against Hawkeye Security Insurance Company and did not have the right to control or forestall the disposition of Linder's claim or suit against Hawkeye Security Insurance Company."

Thus, as appears patently, the succeeding opinion of the Missouri Supreme Court, *en Banc*, agrees with neither the chancellor's opinion below nor the unpublished divisional opinion but holds to the contrary that equitable garnishment is a proper and long standing remedy. But, thereupon, it spontaneously finds as a new element in the action that appellants are excluded from the protection of the equitable remedy by the newfound bar of the statute.

It is believed that the time and method of drawing the validity of the statute into question, that of raising it with particularity in the motion for rehearing (Appendix C) as soon as it became manifest that on the initiative of the Supreme Court of Missouri, *en Banc*, a new and novel construction of the statute, repugnant to the Constitution

of the United States, would be utilized to exclude appellants from otherwise available equitable remedy, constitutes raising the federal question at the earliest opportunity within the jurisdictional findings and authority of the cases believed to support jurisdiction.

The proposition that a federal question is timely raised in a motion for rehearing in an appellate court if the basis for the claim of a federal right denied first appears in the appellate court opinion was followed in similar circumstances in *State of Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U.S. 313, 320, 50 S.Ct. 326, 327, 74 L.Ed. 870; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677, 50 S.Ct. 451, 453, 74 L.Ed. 1107, and *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 367, 53 S.Ct. 145, 149, 77 L.Ed. 360.

The rationale of those holdings is supported by the principle that a litigant has no "standing" to question the validity of a statute until he can show that he will be adversely affected by its application. *Poe* v. *Ullman*, 367 U.S. 497, 503, 504, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989; *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405, 407, 21 S.Ct. 206, 207, 45 L.Ed. 252. Until the instant opinion of the Supreme Court of Missouri, *en Banc*, construed the statute to exclude them from equitable garnishment of their judgment debtor's claims against his liability insurer, these appellants could not show the jurisdictional element of "standing" to question the validity of the statute, for, we submit, in view of the prior judicial interpretation that the statute afforded additional remedy, and in view of the fact that no party urged a new construction of the statute in this action to bar prior existing remedy and that no court writing in decision, prior to the opinion of the Supreme Court of Missouri, *en Banc*, mentioned or relied on the statute, appellants could not have foreseen the ac-

tion of the court *en Banc* of initiating a new construction of the statute and applying it against them.

The subsequent order of the Supreme Court of Missouri, *en Banc*, (Appendix D) overruling the motion for a rehearing without acknowledgement of the constitutional questions, of necessity results in the adverse application of the statute against appellants. It seems to be settled that a final judgment applying and enforcing a statute over timely contentions of its constitutional invalidity necessarily has the effect of an opinion affirming the validity of the statute as applied, within the jurisdictional meaning of present Title 28, Section 1257(2), United States Code. *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 288-290, 42 S.Ct. 106, 108, 66 L.Ed. 239; *Fiske* v. *State of Kansas*, 274 U.S. 380, 385, 47 S.Ct. 655, 656, 71 L.Ed. 1108.

THE QUESTIONS ARE SUBSTANTIAL

The judgment in its exclusion of appellants from the protection of equity, stands or falls with the validity of the statute on which its decision of exclusion is based. The opinion calls the question ruled by the statute, the "critical issue" and the "basic question." The validity of the statute cannot be separated from the judgment it dictates. Its validity is a question of substance to the case.

The recurring constitutional question of arbitrary legislative classification arises with frequency because of the unlimited number of forms which legislative discrimination may assume. We find no specific prior decision of this Court which can be pointed to as deciding the question of the validity of the statute treated here and it is suggested that the federal tests for judging its exclusion of appellants for invidiousness, because of the great variety of forms in which invidious discrimination may appear, require a case to case examination of the facts in the per-

spective of the legislative intent existent in each such case. And, as was observed by this Court as addendum to those federal standards of judgment, "To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine if they are obnoxious to the constitutional provision.'" *Morey* v. *Doud*, 354 U.S. 457, 464, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485.

The patent thrust of the statute's positive language is directed to creating a remedy, not to destroying or denying another remedy.

The statute's application as barring only a selected class of creditors from the full remedy of equity is a "discrimination of unusual character."

Under the doctrine of equitable garnishment as it applies generally in Missouri, any judgment creditor who cannot obtain full satisfaction of his judgment through the mechanics of law and whose judgment debtor possesses choses in action which cannot be levied on at law, may have an equitable garnishment of those choses in aid of execution on the unsatisfied judgment. This doctrine of equitable garnishment goes hand in glove with the statutory statement of the public policy of Missouri declaring, in protection of creditor's rights, that conveyances of things in action, made with intent to hinder, delay or defraud creditors, are "clearly and utterly void." Section 428.020, Missouri Revised Statutes, 1969, included as Appendix I.

The Supreme Court of Missouri, *en Banc*, recognizes that insured drivers may assert valid claims for the amounts of excess judgments as well as for other resultant damages from the insurer's breach of its contract of insurance as it notes: "At the trial, Linder testified as to the details of the damage suffered by him because of the denial of coverage." (Opinion, Appendix B).

But, the opinion and final judgment, contrary to the otherwise general protection of creditors afforded in Missouri, hold that the statute excludes appellants from all judicially enforceable claim to any and all of their judgment debtor's choses in action against his insurer, be it his tort claim for the excess amounts of the judgments by reason of the insurer's bad faith refusal to settle within policy limits, be it his breach of contract claims for the expense of his defense or for the loss of his driver's license under the safety responsibility laws, be it his loss of income for inability to drive to his places of employment, be it whatever his claim. All of his claims asserted in this action against his insurance company are immune from levy.

No other in Missouri who might have liability to Linder on a chose in action would enjoy such statutory immunity to the equitable garnishment of his creditors; only liability insurance companies.

In this the statute makes "discrimination of unusual character."

The unusual character and the practical effect of the statutory exclusion is that such excluded, unsatisfied judgment creditors as appellants, without remedy at law and denied resort to equity, are relegated to the bounty or to the avarice of their insolvent judgment debtors for resolution of whether they may be granted satisfaction of their judgments or be denied.

So it appears naked and offensive in this action.

By the invidious discrimination of the statute against judgment creditors in the position of appellants, their debtors alone from among all other debtors in Missouri are endowed with the untrammeled power to elect and

decide, "thumbs up," "thumbs down." Satisfaction of the judgments shall be granted or shall be denied.

The unimpaired choices were bestowed in this cause on appellee Linder by the statute's ouster of equity. On the one hand he could prosecute his claims against appellee Hawkeye Security Insurance Company and thus compel payment of the judgments. On the other hand, he could simply abandon his claims and defeat collection of the judgments. He did neither. He opted for a third available choice to his own pecuniary benefit. He pursued his claims by the vehicle of this action to the point where he was able to exact personal tribute from his insurer in bargain for the dismissal of his claims. This he did. Avarice triumphed. He was paid for the defeat of appellants' judgments. This the opinion and judgment approve. The insolvent litigant debtor's decision is final. He alone decreed defeat of his creditors. His self-interest prevails. There is no review.

His choses were his alone, beyond the pale of law and the statute now prevents the interference of equity.

The statute has substituted the self-interest of an insolvent judgment debtor, an adversary litigant, for the extra-legal impartiality and fairness of the chancery, a substitution which is clearly repugnant to every fundamental precept of jurisprudence and justice. In the name of fairness, no litigant should be the empowered arbiter of the controversy. Impartiality is the keystone of justice.

The philosophy of government in this nation is based upon the precept that the rights of man shall not depend upon the whim and caprice of men but shall be determined by the impartiality of law. The statute which casts these creditor appellants to the mercy of their debtor while preserving asylum in the protection of law to other creditors offends every basic concept of even handed justice.

Thus, the question of the validity of the statute, of vital substance to the decision of this cause, transcends this single cause and has a wide interest and importance to the basic concept of justice in this nation. Can there be justice when the powers of equity are ousted and the adversary litigant is endowed by statute with the supreme and unreviewable power to grant his creditors satisfaction or cast them in defeat? The question begets its answer. The imperious edict of man over men vanished from these United States with the American Revolution.

But, appellee Linder has exercised it over these appellants in this cause, so enabled by the statute in question. The constitutional questions presented are substantial and their resolution is of basic and widespread public importance.

CONCLUSION

For the above and foregoing reasons, this appeal presents substantial federal questions which are not only vital in this cause but are of basic and widespread public importance; jurisdiction is conferred on this court by statute and we respectfully suggest that probable jurisdiction should be noted and this appeal docketed for hearing on briefs and argument.

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APPENDIX A

Final Judgment of the Supreme Court of Missouri, En Banc

Entered October 11, 1971.

IN THE SUPREME COURT OF MISSOURI
EN BANC

And thereafter, on the 11th day of October, 1971, the following proceedings were had and entered of record in said cause, to-wit:

53846

Clifford Eugene Linder, Respondent,

vs.

Hawkeye-Security Insurance Company, a corporation, Respondent,

---

Edwin Ray Haynes, et al., Appellants.

Appeal from the Circuit Court of Jackson County

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants costs and charges herein expended and have therefor execution. (Opinion filed.)

APPENDIX B

Opinion of the Supreme Court of Missouri, En Banc

Filed October 11, 1971

Officially published at 472 S.W.2d 412

IN THE SUPREME COURT OF MISSOURI

EN BANC

CLIFFORD EUGENE LINDER,
Respondent,

v.

HAWKEYE-SECURITY INSURANCE COMPANY, a Corporation,
Respondent,

and

EDWIN RAY HAYNES et al.,
Appellants.

No. 53 846

Appeal from the Circuit Court of Jackson County

Honorable Paul E. Vardeman, Judge

Per Curiam

The sole question presented in this case is whether or not any possible claim that an insured driver of an automobile might have against his insurance carrier for "excess coverage" over and above the policy limits is subject to equitable garnishment by those having obtained judgments against the insured in amounts exceeding the coverage designated in the policy. We are compelled to hold that it is not.

Factually, the record reflects that Linder, the insured driver, was on April 28, 1956, involved in a collision with an automobile in which the Haynes family was riding. Mrs. Haynes was killed and the husband and three chil-

dren each suffered serious injuries. Five separate damage suits were filed against Linder, and he forwarded all pleadings to the Hawkeye-Security Insurance Company with a demand that it defend the suits. The company refused for the asserted reasons that it had not issued a policy to Linder, nor was he a "permissive" driver of one Bacus who prior to the accident had purchased liability insurance covering the car Linder was driving. That policy provided a total of $10,000 for personal injury claims arising from one occurrence. After refusal of the company to defend the suits, Linder and his own attorney filed pleadings, making up the issues, and all five cases were consolidated for trial. A jury was waived, and on the same day judgments were entered against Linder in a total amount of $115,000. In due time, garnishments reference two of the judgments were run against the company. Section 379.200, RSMo 1969, V.A.M.S. In the garnishment proceeding, it was determined that Linder was an insured driver by virtue of the liability policy Bacus had obtained from Hawkeye, and judgments were entered in the total amount of $10,000 plus interest. These judgments were affirmed on appeal in Haynes v. Linder [and Hawkeye-Security Insurance Company], Mo. App., 323 S.W. 2d 505, wherein may be found the details as to how the automobile in question got from Bacus to Linder. The company satisfied these judgments, which left unpaid judgments of $105,000 against Linder in favor of the Haynes.

The present suit was then filed by Linder against Hawkeye and the Haynes, seeking a declaration that Hawkeye was liable for the total amount of the unpaid judgments plus damages for attorney's fees, loss of driver's license and loss of income; and also, that the Haynes be enjoined from having execution on their judgments against him in view of the existing chose in action against Hawk-

eye. The Haynes, in effect, adopted this position by filing a cross-claim against Hawkeye wherein they asserted that they had an equitable lien on Linder's claim for "excess coverage" against Hawkeye.

At the trial, Linder testified as to the details of the damage suffered by him because of the denial of coverage. In addition, testimony was given that the Haynes had offered to settle all claims, both before and after trial, for amounts within the designated coverage of $10,000, and that such offers were forwarded to Hawkeye. The trial court ruled that the evidence did not show that there had been a firm offer to settle the five original suits within the policy limits, which is, generally, the factual basis upon which a claim for "excess coverage" is bottomed. However, in view of what we believe to be the proper disposition of this case, we need not consider the propriety of that ruling. In any event, prior to entry of judgment by the trial court, Linder advised the Haynes that he planned to settle his claim against Hawkeye for $4,000 and to dismiss his petition with prejudice. Over objection by the Haynes, Linder's petition was dismissed with the stipulation that such action should have no bearing on the cross-claim of the Haynes. The trial court approved dismissal of Linder's petition and ruled that the Haynes' equitable claims against Hawkeye were foreclosed. From these and other findings, the present appeal was taken.

As noted, we need not consider whether or not the trial court was correct in finding that there had never been a firm offer to settle within the coverage; nor, need we consider what, if any, claim for "excess coverage" Linder might have had against Hawkeye. Zumwalt et al. v. Utilities Ins. Co., Mo., 228 S.W. 2d 750; Landie v. Century Indemnity Company, Mo. App., 390 S.W. 2d 558; Keeton, Liability Insurance and Responsibility For Settlement, 67 Harvard Law Review 1136. This, for the reason, the

sole issue is whether or not the Haynes as judgment creditors could force an equitable garnishment on Hawkeye, the insurer, for any funds in excess of the limits designated in the liability policy covering Linder. On this question, the Haynes' basic argument is that: "The Haynes Are Judgment Creditors Of Linder Who Have No Adequate Remedy at Law and by So Pleading, in the Nature of a Creditor's Bill, Levied Upon and Do have Equitable Liens on Linder's Right To Recovery Against Hawkeye * * * 'Equitable Garnishment' is an established doctrine which affords a right and the method to a judgment creditor to reach assets, including choses in action, which are beyond the reach of legal process." [Citing Pendleton v. Perkins, 49 Mo. 565; Geist v. St. Louis, 156 Mo. 643, 57 S.W. 766; Schott v. Continental Auto Ins. Underwriters, 326 Mo. 92, 31 S.W. 2d 7; State ex rel. Brigance v. Smith, 345 Mo. 793, 135 S.W. 2d 355.] As argued, there can be no doubt but that the remedy of "equitable garnishment" is a long recognized part of the equity jurisprudence of this state, and that it serves to fill that void created when the normal processes of law are found to be inadequate. Ordinarily, such an established principle might be asserted as the basis for the present claim presented by the Haynes. However, as must be recognized, there are now applicable statutory provisions pertaining to the crucial issue in this case. Those sections are 379.195 and 379.200, RSMo 1969, V.A.M.S., and the latter provides: "Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, *provided for in the contract of insurance* between the insurance company,

person, firm or association as described in section 379.195, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment." (Emphasis added.)

Since the original passage of this section, Laws 1925, p. 274, the appellate courts of this state have considered its implications on several occasions. In Schott v. Continental Auto Ins. Underwriters, 31 S.W. 2d 7, 12 (1930), this court considered the constitutionality of the statute and said: "The remedy provided for in the act is essentially that of a creditor's bill or equitable garnishment. It is one that has long been applied by courts of chancery, and one which may be invoked by a judgment creditor when the property and funds, including choses in action, of the judgment debtor cannot be reached by execution, and when execution cannot be otherwise satisfied."

The particular section has also been classified as substantive and not procedural. State v. Dinwiddie, Mo., 224 S.W. 2d 985, 987; State ex rel. McCubbin v. McMillian, Mo. App., 349 S.W. 2d 453. See also Homan v. Employers Reinsurance Corporation, Mo., 136 S.W. 2d 289. Nor, has it been found to be an exclusive remedy, because this section did not ". . . destroy any remedy by which the insurance fund could be made available to the judgment creditor; but its purpose was to afford another remedy by which, with existing remedies, such funds, under all conditions, might be made available and subject to the payment of his judgment." Lajoie v. Central West Casualty Co., Mo. App., 71 S.W. 2d 803, 812.

Thus, the basic question must be—after a judgment creditor has recovered from the insurer the coverage limits designated in the policy as provided in Section 379.200, should such judgment creditor then be allowed to proceed by the non-statutory procedure of equitable garnishment to recover directly from the insurer amounts, excluding interest, in excess of the money "provided for in the contract of insurance"? As is readily apparent, the permitting of such additional recovery from the insurer by the judgment creditor would be in disregard of the statute and would necessarily result in our indirectly repealing the limitations therein. In view of the many legislative enactments regulating the operations of liability insurance carriers in this state, we are more than reluctant to ignore the monetary limitations specifically set out in Section 379.200. To hold otherwise would not be within the spirit of the statute and would contravene the apparent will of the legislature.

The judgment of the trial court is affirmed.

All concur except Holman and Henley, JJ., who concur in result.

APPENDIX C

Motion for Rehearing in the Court En Banc

Filed October 26, 1971

No. 53,846

IN THE SUPREME COURT OF MISSOURI
EN BANC

CLIFFORD EUGENE LINDER,
Respondent,

VS.

HAWKEYE SECURITY INSURANCE COMPANY,
A CORPORATION,
Respondent,

AND

EDWIN RAY HAYNES, ET AL.,
Appellants.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, DIVISION NO. 3
HONORABLE PAUL E. VARDEMAN, JUDGE

APPELLANTS' MOTION FOR A REHEARING IN THE COURT EN BANC AND SUGGESTIONS IN SUPPORT THEREOF

MOTION FOR A REHEARING

Come now the appellants and move the court for a rehearing on the grounds that the opinion filed in this cause in this appeal on October 11, 1971, constitutes a denial to these appellants of their constitutional rights to equal protection of law, due process of law and to

constitutional certain remedy for their injuries, all which for the first time appears by said opinion and is now raised at the earliest possible moment, all in the following particulars:

A.

For the first time with the filing of the opinion in this cause on October 11, 1971, it is made to appear by Judicial construction of Section 379.200, RSMo 1969, V.A.M.S., that said statute is controlling in this cause and that said statute constitutes a limitation and impairment of the equitable lien which attaches to the choses of a judgment debtor when the judgment against him cannot be satisfied at law. No suggestion of such a controlling or limiting effect had been made in this cause prior to the opinion of October 11, 1971, by opinion, brief, suggestion, question or argument, by court or party, and in so first holding and announcing in its opinion of October 11, 1971, this Court did not have the advantage of adversary briefs to aid its construction of the statute. The statute has never heretofore been construed to limit or impair liens. Therefore, and now at this earliest time when the unconstitutionality of the statute and its application to the prejudice of these appellants is made to appear in the judicial pronouncement of October 11, 1971, appellants raise and assert their claim that said statute as a monetary limitation and impairment of liens on the liabilities of insurance companies is unconstitutional and void and that its application as controlling in this cause prejudicially deprives these appellants of due process and equal protection of law under both the federal and the Missouri constitutions.

Section 379.200, RSMo 1969, V.A.M.S.
House Bill 53, Laws of Missouri, 1925, p 274.
Constitution of Missouri, 1875, Article 4, Section 28.
Schott v. *Continental Auto Ins. Underwriters,* MoSup, 31 S.W.2d 7.

1. From the whole of the class of those whose liabilities to judgment debtors may be levied on in equity to the full extent of the powers of equity when the judgment cannot be satisfied at law, Section 379.200 arbitrarily, capriciously and in violation of both state and federal constitutional guaranties of equal protection of law, unconstitutionally creates a favored and excepted sub-class, limited to insurance companies, and grants insurance companies, only, immunity to general equitable levy on any of its liability to a policyholder-judgment debtor which may exceed contracted policy limits. This selection for exception of the privileged sub-class bears no relationship to any valid purpose of classification, creates an unconstitutional privileged class and violates the constitutional rights of these appellants to equal protection and due process of law under both state and federal constitutions:

a. Section 1 of the 14th amendment to the Constitution of the United States is directed to the states and guarantees to these appellants that no act of the State of Missouri shall deprive them of equal protection or due process of law; classification by government must have a valid relationship to the purpose of the legislation or it is a denial of equal protection of law and the arbitrary capricious and invidious class creation by Section 379.200 granting a privileged exceptional immunity to insurance companies from equitable levy on their liabilities to judgment debtors for all amounts in excess of contracted policy limits while others having liability to judgment debtors continue to be subject to full equitable garnishment, de-

prives these appellants of those federally guaranteed rights to equal protection and due process of law.

Constitution of the United States, Amendment 14.

Morey v. *Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485.

Glona v. *American Guarantee & Liability Ins. Co.*, 379 F.2d 545, reversed 88 S.Ct. 1515, 391 U.S. 73, 20 L.Ed.2d 441, rehearing denied 89 S.Ct. 66, 393 U.S. 898, 21 L.Ed.2d 185.

Schott v. *Continental Auto Ins. Underwriters*, MoSup, 31 S.W.2d 7.

Section 379.200, RSMo 1969, V.A.M.S.

b. Under Article I of the Missouri constitution, Section 2 guarantees these appellants equal rights under law, Section 10 guarantees to them due process and Section 14 guarantees a certain remedy for every wrong. The creation of a sub-class, selecting only insurance companies from and to the exclusion of all the other individuals and companies having liabilities to judgment debtors, and granting those insurance companies immunity to the powers of equity to levy on their liabilities in excess of their policy limits an arbitrary and capricious exception to the general powers of equity violates those constitutional guarantees to appellants of equal rights under law, due process of law and deprives them of remedy.

Constitution of Missouri, 1945, Article I, Section 2.

Constitution of Missouri, 1945, Article I, Section 10.

Constitution of Missouri, 1945, Article I, Section 14.

State v. *Julow*, MoSup, 31 S.W. 781, 783.

State v. *Miksicek*, MoSup, 125 S.W. 507, 511.

City of Cape Girardeau v. *Groves Motor Co.*, MoSup, 142 S.W.2d 1040, 1045.

Reals v. *Courson*, MoSup, 164 S.W.2d 306.

2. Section 379.200, as it is relied on and followed as controlling by the opinion of October 11, 1971, imposes its statutory monetary limitation impairment on only those liens which can be levied in equity on the liabilities of insurance companies to judgment debtors. For no reason related to the purpose of the legislation, said companies are arbitrarily and specially selected from the broad class of all others with liabilities to judgment debtors which still can be levied on by equitable lien to the full power of equity unimpaired by statute. Thus, Section 379.200, RSMo 1969, V.A.M.S. is an unconstitutional special law impairing liens, the passing of which was prohibited by the specific language of the Missouri constitution in effect at the time of the law's enactment in 1925 and uninterruptedly continued in effect to this time by the present Missouri constitution, Article III, Section 40: "The general assembly *shall not pass any* local or *special law*: (1) authorizing the creation, extension or *impairment of liens;*" Depriving appellants of full satisfaction of their judgments by application of such an unconstitutional statutory bar to their recovery deprives them of their property without due process of law, denies them full remedy and denies them equal protection of law, all in violation of the 14th amendment to the Constitution of the United States and in violation of Article I, Sections 2, 10 and 14 of the Missouri constitution.

Constitution of Missouri, 1875, Article IV, Section 53.
Constitution of Missouri, 1945, Article III, Section 40.
Reals v. *Courson*, MoSup, 164 S.W.2d 306, 307.
Section 379.200, RSMo 1969, V.A.M.S.

3. The three maxims of statute construction are (a) a presumption in favor of constitutionality, (b) the application of plain and rational meaning and (c) the avoidance of absurdities. Section 379.200 was enacted in 1925,

more than a decade before any insurance company ever was held liable for more than its policy in Missouri in 1936. It was enacted to cure the specific and then prevalent evil of the refusal of insurance companies to pay judgments and did so by its statutory by-pass of the jurisdictional requirement for the proof of the absence of an adequate remedy at law in order for the judgment creditor to obtain redress in the equity courts. That statute has been uniformly held to create an additional remedy for judgment creditors and not to limit existing remedies. To now hold that the 1925 Legislature to the contrary intended to impair the long existing equitable garnishment of a creditor's bill and to prevent equitable levy on then unknown and unrecognized liabilities of insurance companies in excess of policy limits is to violate the cardinal principles of statute construction:

a. First, by indulging in a presumption that the statute is a constitutionally prohibited special law impairing liens.

b. Second, by ignoring the plain and often recognized and written of intent of the Legislature to create an additional remedy and not to prejudice existing remedies.

c. Third, by attributing to the 1925 Legislature the incredible foresight of knowing in advance, more than a decade before the fact, of the judicial declaration of bad-faith-predicated liabilities of insurance companies in excess of their policy limits and with passing Section 379.200 for the special benefit of the insurance companies whose malfeasances were the evil subject of the law with the clear intent of denying a judgment creditor a lien in equity on that yet to be recognized liability.

City of St. Joseph v. *Hankinson*, MoSup, 312 S.W.2d 4, 10.

Schott v. *Continental Auto Ins. Co.*, MoSup, 31 S.W. 2d 7.

Pendleton v. *Perkins*, 49 Mo. 565.

House Bill 53, Laws of Missouri, 1925, p 274.

Section 379.200, RSMo 1969, V.A.M.S.

Section 379.195, RSMo 1969, V.A.M.S.

Lajoie v. *Central West Casualty Co.*, MoApp, 71 S.W.2d 803.

Constitution of Missouri, 1875, Article IV, Section 28.

Constitution of Missouri, 1945, Article III, Section 23.

Constitution of United States, Amendment 14.

Constitution of Missouri, 1945, Article I, Section 2.

Constitution of Missouri, 1945, Article I, Section 10.

Constitution of Missouri, 1945, Article I, Section 14.

Constitution of Missouri, 1875, Article IV, Section 53.

Constitution of Missouri, 1845, Article III, Section 40.

Zumwalt v. *Utilities Insurance Co.*, MoSup, 228 S.W.2d 750.

B.

The opinion filed October 11, 1971, on its face and in conjunction with the stipulated and judicially noted facts in this record, is so summary and arbitrary as to constitute a denial of due process of law to appellants under the 14th amendment to the federal constitution and Article I, Sections 10 and 14 of the Missouri constitution in that in this record it is stipulated and judicially noted that Hawkeye has never paid the costs or accrued interests in three of the Haynes damage suits; such payments are provided for in the written policy and constitute "insurance money, provided for in the contract of insurance;" continuous claim for such "insurance money, provided for in the contract of insurance" has been consistently made and preserved at every step of the proceedings by appellants;

the opinion of October 11, 1971, holds on the one hand that Haynes are entitled only to "insurance money, provided for in the contract of insurance" but conversely, on the other hand affirms the trial court in denying to the appellants all recovery including denial of the "insurance money, provided for in the contract", the costs and accrued interest which undisputedly have not been paid. Such denial to appellants is so summary and arbitrary that it, in and of itself, constitutes unconstitutional denial of redress and denial of due process of law.

Constitution of the United States, Amendment 14.

Frito-Lay, Inc. v. *Morton Foods Co.*, (10th CCA), 316 F.2d 298.

Constitution of Missouri, 1945, Article I, Section 10.

Constitution of Missouri, 1945, Article I, Section 14.

Respectfully submitted,

JOHN C. MILHOLLAND
302 East Pearl
Harrisonville, Missouri 64701
BEN W. SWOFFORD
600 Waltower Building
Kansas City, Missouri 64106
Attorneys for Appellants Haynes

ANDERSON AND MILHOLLAND
SWOFFORD, AND WAISBLUM
Of Counsel

APPENDIX D

Order of the Supreme Court of Missouri, En Banc, Denying Rehearing

Entered November 8, 1971

IN THE SUPREME COURT OF MISSOURI

EN BANC

And thereafter, on the 8th day of November, 1971, the following proceedings were had and entered of record in said cause, to-wit:

53846

Clifford Eugene Linder, Respondent,

vs.

Hawkeye-Security Insurance Company, a corporation, Respondent, Edwin Ray Haynes, et al., Appellants.

Now at this day, on consideration of appellants' motion for rehearing in the above-entitled cause, it is ordered by the Court that the motion be and the same is hereby overruled.

APPENDIX E

Notice of Appeal to the Supreme Court of the United States

Filed in the Supreme Court of Missouri, December 6, 1971

IN THE SUPREME COURT OF THE STATE OF MISSOURI

EN BANC

No. 53,846

CLIFFORD EUGENE LINDER,
Respondent (Appellee)

vs.

HAWKEYE SECURITY INSURANCE COMPANY,
a corporation,
Respondent (Appellee)

and

EDWIN RAY HAYNES, EDWIN RAY HAYNES, NEXT FRIEND OF JON HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF MICHAEL HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF RUTH ANN HAYNES, A MINOR; JON HAYNES; MICHAEL HAYNES AND RUTH ANN HAYNES,
Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that the Appellants above named, hereby appeal to the Supreme Court of the United States from the final Judgment of this Court, en Banc, affirming the Judgment of the trial court pursuant to this

Court's opinion filed October 11, 1971 and its subsequent order overruling Appellants' Motion for Rehearing made and entered on November 8, 1971.

This appeal is taken pursuant to 28 U.S. Code, Sec. 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States.

/s/ John C. Milholland
John C. Milholland
302 East Pearl
Harrisonville, Missouri 64701
/s/ Ben W. Swofford
Ben W. Swofford
Suite 600—823 Walnut Street
Kansas City, Missouri 64106
Attorneys for Appellants

I, Ben W. Swofford, one of the attorneys of record for Appellants herein, depose and say that on the 2nd day of December, 1971, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Clifford Eugene Linder, Respondent herein, by delivering the same to his attorneys, McKenzie, Williams, Merrick, Beamer & Wells, 1100 Bryant Building, Kansas City, Missouri 64106, and Mr. Donald G. Stubbs, 510 Bryant Building, Kansas City, Missouri 64106, and upon the Respondent, Hawkeye Security Insurance Company, a corporation, by delivering the same to Sprinkle, Carter, Larson & Hanna, its counsel of record, at their office at 700 Ozark National Life Building, 906 Grand Avenue, Kan-

sas City, Missouri 64106, and that all parties required to be served have been served.

/s/ Ben W. Swofford
Ben W. Swofford

Subscribed and sworn to before me this 2nd day of December, 1971.

/s/ Virginia H. Niemek
Notary Public, in and for
Jackson County, Missouri
My Commission Expires January 29, 1975.

APPENDIX F

Unpublished Judgment Entry Opinion of Chancellor in Equity, Circuit Court for the 16th Judicial Circuit of Missouri, Division 3

Entered March 29, 1968

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

CLIFFORD EUGENE LINDER,
Plaintiff,
vs.
HAWKEYE-SECURITY INSURANCE COMPANY, a corporation,
and
EDWIN RAY HAYNES,
EDWIN RAY HAYNES, next friend of JON HAYNES, a minor,
EDWIN RAY HAYNES, next friend of MICHAEL HAYNES, a minor,
EDWIN RAY HAYNES, next friend of RUTH ANN HAYNES, a minor,
JON HAYNES, MICHAEL HAYNES, and RUTH ANN HAYNES,
Defendants.

No. 628075
Division 3

JUDGMENT ENTRY

The above entitled cause coming on for hearing on January 26, 1965, and the plaintiff, Clifford Eugene Linder, appearing in person and by his attorney, Donald G. Stubbs; the defendant, Hawkeye Security Insurance Company, appearing by and through its attorney, Richard P. Sprinkle; and the defendants, Haynes, appearing by and through their attorneys, Ben W. Swofford and John C. Milholland;

and the parties hereto having submitted said cause by stipulation of facts and by testimony heard on the 26th day of January and the 29th day of January, 1965; and further the plaintiff Linder and the defendant Hawkeye Security Insurance Company having entered into a settlement, and the cause of the plaintiff Linder having been dismissed with prejudice by stipulation filed on the 10th day of June, 1965, and the Court having taken said cause under advisement and having subsequently re-opened said cause for the receipt of further evidence, and again after the hearing of additional evidence having taken said cause under advisement, does now on this date render the following judgment:

IT IS ORDERED, DECREED AND ADJUDGED that the stipulation of dismissal with prejudice heretofore filed by the plaintiff Linder as against the defendant Hawkeye Security Insurance Company is proper, allowed by the Court, and said claims and cause of action of the plaintiff Linder against the defendant Hawkeye Security Insurance Company are dismissed with prejudice as of the date of the entry of this judgment, and defendants Haynes's motion to set aside release and stipulation of dismissal is overruled; therefore, the Court does not need to determine those matters pertaining to the claim of the plaintiff Linder against the defendant Hawkeye Security Insurance Company on the plaintiff Linder's claim for damages or for declaratory judgment;

IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the plaintiff Linder is not entitled to maintain an injunction action against the defendants Haynes, nor can the plaintiff Linder enjoin the defendants Haynes from proceeding with any lawful means of collecting from plaintiff Linder any valid judgments obtained against the plaintiff Linder in the personal injury judgments rendered on February 28, 1957, in Division No. 12 of the Circuit Court of Jackson County, Missouri at Independence.

IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the Court finds the issues in favor of the defendant Hawkeye Security Insurance Company on the cross-claims of the defendants Haynes, because the right to recovery is one in tort for damages and that right is vested in the plaintiff Linder alone who became an insured under the Hawkeye Security Insurance Company policy; further, that the defendants Haynes have no standing in the suit between the plaintiff Linder and the defendant Hawkeye Security Insurance Company and are not in privity with the defendant Hawkeye Security Insurance Company, and further since the plaintiff Linder has now dismissed his claims and cause of action against the defendant Hawkeye Security Insurance Company with prejudice, the defendants Haynes have no right or cause of action to maintain against the defendant Hawkeye Security Insurance Company; further the Court finds that there was never conveyed to the defendant Hawkeye Security Insurance Company any settlement offer to settle the claims of defendants Haynes as purported in the letter to Paul C. Sprinkle by Lawrence R. Smith dated April 18, 1958, this being a mere recommendation and not an offer which could be accepted; and defendants Haynes requested findings of fact and conclusions of law not in accordance with the above findings and conclusions are refused.

IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the Court finds the issues in favor of the plaintiff Linder and against the defendants Haynes on the counter-claims of the defendants Haynes, all at the cost of the defendant Hawkeye Insurance Company.

Dated this 29th day of March, 1968.

/s/ Paul E. Vardeman
Circuit Judge

APPENDIX G

Unpublished Opinion of Supreme Court of Missouri, Division 2

Filed April 13, 1970

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

CLIFFORD EUGENE LINDER,
Respondent,
vs.
HAWKEYE SECURITY INSURANCE COMPANY, a Corporation
Respondent,
and
EDWIN RAY HAYNES, et al.,
Appellants.

No. 53846

Appeal from the Circuit Court of Jackson County, Missouri, Division No. 3
Honorable Paul E. Vardeman, Judge

This is an appeal from a final judgment entered by a court of equity in an action by the respondent Linder against the Hawkeye Security Insurance Company and the Haynes family. Linder sued for money damages, a declaratory judgment and an injunction suit.

Linder was the plaintiff against the Hawkeye Security Insurance Company and Edwin Ray Haynes, et al. The Hayneses filed an answer, counterclaim and cross claim in which Haynes sought to impress an equitable lien against Linder's cause of action against Hawkeye Security Insurance Company. Haynes further sought judgment

against the Hawkeye Security Insurance Company in the amount of $105,000.00. A number of facts were stipulated to by written agreement entered into by the attorneys and their clients.

The Haynes family, consisting of mother and father and three minor children, were involved in an automobile collision with one Clifford Linder on April 28, 1956. Mrs. Haynes was killed in the automobile accident. Serious injury resulted to her husband and three children. Five sepaate damage actions were filed by Haynes against Linder, and process was served on Linder on April 28, 1956 and on June 5, 1956. Mr. Linder then forwarded all pleadings to the Hawkeye Security Insurance Company through his private attorney, James A. Williams, and demand was made by attorney Williams, on behalf of Mr. Linder, to defend the suit on behalf of Linder.

The Hawkeye Security Insurance Company had issued a public liability policy of insurance to one Robert A. Bacus on June 6, 1955. This policy covered a 1951 DeSoto automobile to the extent of $5,000.00 and $10,000.00 for personal injury claims arising from one occurrence. There is no dispute that this policy of insurance was in force on April 28, 1956, the date of the accident between Linder and Haynes. Mr. Linder was driving the 1951 DeSoto automobile.

The Hawkeye Security Insurance Company, acting through its claim manager, Mr. L. J. Vandever, refused to defend these lawsuits against Linder and redelivered the summons and processes in each suit to attorney Williams by way of a letter dated June 7, 1956. Attorney Williams then filed pleadings and answers making up all the issues in all five cases. All five cases were consolidated for trial and came to trial before the Honorable John R. James on February 28, 1957. Jury trial was waived. Said causes

of action were tried on this day and resulted in judgments for the plaintiffs Haynes and against defendant Linder in the amount of $115,000.00. Hawkeye Security Insurance Company was advised on March 4, 1957 of the results of the trial and the judgments entered. These judgments became final and garnishments were run in aid of execution on two of these judgments. These garnishment proceedings were tried before a jury and resulted in a verdict in favor of the judgment creditors, Haynes, and against Hawkeye Security Insurance Company. These judgments were affirmed on appeal (See Haynes v. Linder, 323 S.W.2d 505). Following the affirmation of these judgments on appeal the Hawkeye Security Insurance Company paid its full coverage on the judgments, leaving unpaid judgments of $105,000.00 plus interest and costs against Linder.

The evidence in the garnishment proceedings disclosed, upon stipulated documents, that Linder was driving the 1951 DeSoto automobile at an excessive speed and on the wrong side of the road at the time he collided with the Haynes automobile. In addition to that he had been off work that day and had visited numerous taverns and had a strong odor of alcohol on his breath at the time of the occurrence. Mr. James L. Williams was employed as the attorney by Linder to defend these lawsuits. Mr. Williams learned that these suits could be settled for less than $10,000.00, (the full amount of the coverage) and he relayed this offer to the claims manager, Mr. Vandever, at Hawkeye Security Insurance Company.

On April 18, 1958 Mr. Laurence Smith, representing the Hayneses, wrote a letter to Mr. Paul Sprinkle, attor-

ney at law, representing the Hawkeye Security Insurance Company. The contents of the letter were as follows:

"Dear Paul,

The two lowest numbered of the above cases (being all five cases against Clifford Linder) are set for trial on April 28. The exposure of Hawkeye Security Insurance Company appears to be $10,000.00, plus approximately $700.00 in interest, plus court costs. Following up our phone conversation, I wish to advise you that we will *recommend* settlement of all of the above cases as against all garnishees for the total sum of $9,750.00 if settlement can be agreed upon by noon Friday, April 25. Please consider our *recommendation* withdrawn after that time."

This recommendation was never accepted by the Hawkeye Security Insurance Company.

This pending suit was then filed by Linder against the Hawkeye Security Insurance Company and the Hayneses seeking a declaration that Hawkeye Security Insurance Company was liable for the entire amount of the unpaid judgments plus damages for attorneys' fees, for loss of his driver's license and loss of income. The Hayneses were named as defendants and they filed counterclaims against Linder and cross claims against the Hawkeye Security Insurance Company. Mr. Linder testified that he lost his driver's license as a result of this occurrence and was unable to drive for a period of one year. In addition he lost periods of employment as a result of losing his driver's license. Mr. Laurence R. Smith, who at the time of this trial was Commissioner of the Probate Court of Jackson County, testified that he was the attorney for the Hayneses. He wrote the letter to Mr. Sprinkle. He explained that he offered to settle all five suits for the

amount stated in the letter and the offer was refused. He used the word *"recommendation"* in the letter because three of the plaintiffs were minors and would need approval of the court to settle their claims. This trial concluded on January 9, 1965. Subsequently, the attorney for the Hayneses received a letter, dated May 14, 1965, from Mr. Williams, Linder's counsel, advising that he had received an offer to settle the instant case from the Hawkeye Security Insurance Company. He further advised that his client, Linder, insisted the offer be accepted and attorney Williams was forced to abide by his client's wishes. On May 20, 1965, defendants Haynes filed their objections to the dismissal of plaintiff's petition requesting the equity court to refuse Linder permission to dismiss his cause of action.

On May 21, 1965, Mr. Linder executed a release to Hawkeye Security Insurance Company releasing it from all claims arising out of the Haynes collision of April 28, 1956. Consideration for this release was $1,250.00. He agreed to dismiss his case "with prejudice."

On June 10, 1965, a "Stipulation for Dismissal of Plaintiff's Cause of Action" was filed in the instant case. The stipulation read as follows:

> "Come now the attorneys for the plaintiff, Clifford Eugene Linder, and the attorneys for the defendant, Hawkeye Security Insurance Company, and state that the petition and cause of action of the plaintiff, Clifford Eugene Linder, is, and shall be dismissed with prejudice, as to the defendant, Hawkeye Security Insurance Company. The parties to this Stipulation further stipulate that nothing contained shall operate as a dismissal of the cross claim of the defendants Haynes."

Thereafter, on July 28, 1965, defendants Haynes filed a Motion to Set Aside the Release of plaintiff Linder's claim against the defendant Hawkeye Security Insurance Company and the Stipulation for Dismissal. The contentions of Haynes in these motions were that the Hayneses, as judgment creditors of Linder, had asserted valid equitable liens upon Linder's cause of action against Hawkeye Security Insurance Company and that they had valid, equitable and legal rights which could not be foreclosed by a settlement between Linder and Hawkeye Security Insurance Company.

In addition to paying the $1,250.00 to Linder, the Hawkeye Security Insurance Company also settled with Linder's attorney. The settlement figure with the attorney was in the amount of $2,750.00, being $1,500.00 for defending the Linders in the original proceedings and $1,250.00 in the instant case. On October 28, 1965, the equity court took the whole matter under advisement.

Thereafter, on March 29, 1968, the equity court entered the following order:

> "* * * It is Ordered, decreed and adjudged that the Stipulation of Dismissal with Prejudice heretofore filed by the plaintiff as against the defendant the Hawkeye Security Insurance Company is proper, allowed by the Court, and said claims and cause of action of the plaintiff Linder against the defendant Hawkeye Security Insurance Company are dismissed with prejudice as of the date of the entry of this judgment, and defendants Haynes' Motion to Set Aside Release and Stipulation of Dismissal is overruled; therefore, the Court does not need to determine those matters pertaining to the claim of the plaintiff Linder against the defendant Hawkeye Security Insurance Company on the plaintiff Linder's claim for damages or for declaratory judgment;

"It is further Ordered, decreed and adjudged that the plaintiff Linder is not entitled to maintain an injunction action against the defendants Haynes, nor can the plaintiff Linder enjoin the defendants Haynes from proceedings with any lawful means of collecting from plaintiff Linder any valid judgment obtained against the plaintiff Linder in the personal injury judgments rendered on February 28, 1957, in Division No. 12 of the Circuit Court of Jackson County, Missouri, at Independence.

"It is further Ordered, decreed and adjudged that the Court finds the issues in favor of the defendant Hawkeye Security Insurance Company on the Cross-Claim of the defendants Haynes, because the right to recover is one in tort for damages and that right is vested in the plaintiff Linder alone who became an insured under the Hawkeye Security Insurance Company policy; further, that the defendants Haynes have no standing in the suit between the plaintiff Linder and the defendant Hawkeye Security Insurance Company and are not in privity with the defendant Hawkeye Security Insurance Company, and further since the plaintiff Linder has now dismissed his claims and cause of action against the defendant Hawkeye Security Insurance Company with prejudice, the defendants Haynes have no right or cause of action to maintain against the defendant Hawkeye Security Insurance Company; further the Court finds that there was never conveyed to the defendant Hawkeye Security Insurance Company any settlement offer to settle the claims of defendant Haynes as purported in the letter to Paul C. Sprinkle by Laurence R. Smith dated April 18, 1958, this being a mere recommendation and not an offer which could be accepted; and defendants Haynes re-

quested findings of fact and conclusions of law not in accordance with the above findings and conclusions are refused.

"It is further Ordered, decreed and adjudged that the Court finds the issues in favor of Linder and against the defendant Haynes on the Counter-Claim of the defendants Haynes, all at the cost of the defendant Hawkeye Security Insurance Company."

It is from this decision of the equity court that the instant appeal arises.

The first point raised by the Hayneses on appeal is that the chancellor in equity erred in decreeing that plaintiff Linder's right to recover against defendant Hawkeye Security Insurance Company was vested in Linder alone and that Haynes had no standing in Linder's suit against Hawkeye and that because of Linder's petition that Haynes had no right or cause of action against Hawkeye.

In determining whether or not the first paragraph of the court's decree is correct, we must first determine whether or not this action brought by Linder against the Hawkeye Security Insurance Company is one in tort or in contract. In plaintiff Linder's petition against the Hawkeye Security Insurance Company, plaintiff alleges that the Hawkeye Security Insurance Company, "in bad faith" did refuse to defend the five suits against the plaintiff. Plaintiff Linder further alleged that the defendant Hawkeye Security Insurance Company was guilty of bad faith and that said defendant knew that the present plaintiff, Linder, was covered by its policy of insurance and knew that it owed a duty to defend this present plaintiff.

Plaintiff Linder further alleges in his petition against Hawkeye Security Insurance Company that as a direct re-

sult of the actions of defendant Hawkeye Security Insurance Company that plaintiff was now liable to the Hayneses in the amount of $105,000.00, together with interest and costs. Linder further alleged that as a direct result of Hawkeye Security Insurance Company's bad faith that plaintiff Linder had been humiliated and embarrassed by the existence of the judgments and by the executions and garnishments. Linder further alleged that as a direct result of Hawkeye Security Insurance Company's bad faith that his driver's license was revoked and suspended. He further alleges that as a direct result of said bad faith that he was required to expend monies for attornys' fees. Throughout the entire petition Linder alleges all the actions result from the bad faith of defendant Hawkeye Security Insurance Company.

In an action somewhat similar to the one in question this court decided that the action was one in tort, not an action in contract. In the case of Zumwalt, et al. v. Utilities Insurance Company, 228 S.W.2d 750, the plaintiffs sued Utilities Insurance Company to recover from said company the balance of an unpaid judgment as a result of said company's bad faith and negligence in failing to settle a suit against the plaintiffs within the limits of a liability policy. In that case the Utilities Insurance Company insured the Zumwalt Company for public liability. This was a company engaged in the business of selling garage doors, commonly known as "overhead doors." A man by the name of Burneson was injured as a result of the negligence of one of the employees of the Zumwalt Company. Burneson subsequently filed suit against the Zumwalt Company, asking for $40,000.00 in damages. A verdict was returned in the amount of $15,000.00. The defendant Utilities Insurance Company paid $10,000.00 and interest on the amount of the judgment and this left $5,000.00 unpaid. The plaintiff Zumwalt Corporation sub-

sequently paid the $5,000.00 additional and the interest thereon, and thereafter sued Utilities Insurance Company alleging bad faith in refusing to settle within the limits of the policy. Plaintiffs Zumwalt, et al., recovered $7,012.77 actual damages which included the $5,000.00 excess coverage plus interest and costs. In upholding the judgment this court said, "We * * * think the weight of authority is that where the insurer in a liability policy reserves the exclusive right to contest or settle any claim brought against the assured, and prohibits him from voluntarily assuming any liability or settling any claims without the insurer's consent, except at his own costs, and the provisions of the policy provide that the insurer may compromise or settle such a claim within the policy limits, no action will lie against the insurer for the amount of the judgment recovered against the insured in excess of the policy limits, unless the insurer is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy." Linder's allegation in the instant case similarly alleges that Hawkeye Security Insurance Company exercised bad faith in refusing to settle within the limits of the policy. The court went on to say in the Zumwalt opinion (supra) that "if defendants had not paid the limit of their policy on the judgment obtained by Burneson, then this section would be applicable. But that is not the case. *This action is a tort action.* It is not an action to recover 'any loss under a policy' of insurance." We further went on to say that "*no action on a contract* will lie against an insurance company for that part of a judgment recovered against the insured which is in excess of the policy limit."

It seems obvious that under the law of the State of Missouri the right to recover was vested in Linder alone and defendants Haynes had no standing in the suit and no right or cause of action to maintain against Hawkeye Se-

curity Insurance Company. One question to be determined is as follows: "Could the Hayneses have filed a similar lawsuit against the Hawkeye Security Insurance Company and be entitled to recover?" The answer is "No." In Missouri it has been the law that every chose in action is assignable, except a claim for tort. Revised Statutes of Missouri 1959, Section 507.010, Supreme Court Rule 52.01. The instant case was an action in tort. Therefore, the right to recover was vested in Linder alone. In the case of Dillingham v. Tri-State Insurance Company, Inc., et al., 381 S.W.2d 914, the Supreme Court of Tennessee decided a suit by a judgment creditor of the insured against an insurer on a claim for the alleged bad faith and negligence in refusing to settle a claim within the policy limits. They held that the judgment creditor could not maintain an action over and against the insurer for the excess of a judgment over and above the policy limits where the judgment creditor's offer of settlement had been accepted he would have recovered a smaller amount than he actually collected. In the instant case had the judgment creditor accepted the full amount of the coverage or a smaller amount than the coverage, he would have had a judgment far less than that which he actually obtained. They held in that case as follows: "As we view it, the amount in excess of the policy limits which an insured might in a proper case be able to recover against the insurer because of its negligence or bad faith in failing to compromise or settle a claim, is not truly of the character of 'insurance,' but rather constitutes damages resulting from the insurer's tort or breach of contract." They quoted from a Florida District Court Appeals case, the style of which was Sturgis v. Canal Insurance Company, et al., 122 So.2d 313, in which the Supreme Court of Florida stated, "We have reached the conclusion that the District Court was correct in its decision that a judg-

ment creditor may not maintain a suit directly against the insurer for recovery of the judgment in excess of the insurance policy limits under the circumstances of this case and the language of the insurance policy issued by the respondents." The Supreme Court of Tennessee in the Dillingham case quoted from 67 Harvard Law Review, pages 1176 and 1177, as follows: "A judicial extension (either by tort or by implied contract theory) of the liability of company beyond that undertaken by the agreement cannot be justified by a purpose of benefiting a third party who is not harmed by anything company has done or failed to do."

The Court of Appeals of Georgia in the case of Francis v. Newton, et al., 43 S.E.2d 282, decided a similar question. They said as follows: "It does not follow that a person injured by the insured and who is not a party to the insurance contract may complain of the negligence or bad faith of the insurer towards its policyholder in failing to adjust or compromise a claim against such policyholder, for the duty of the insurance company to use ordinary care and good faith in the handling of a claim against its insured arises out of the relationship between the insurer and the insured created by the contract or policy of insurance, and there is no fiduciary relationship or privity of contract existing between the insurer and a person injured by one of its policyholders." It necessarily follows in the instant case that the Hayneses were not a party to the insurance contract. There was no duty existing between the Hawkeye Security Insurance Company and the Hayneses. The duty on the part of Hawkeye Security Insurance Company to use ordinary care and good faith in handling the claims involved arose out of a relationship between the Hawkeye Security Insurance Company and Linder. This relationship was theirs and theirs alone.

There was no fiduciary relationship or privity of contract between the Hawkeye Security Insurance Company and the Hayneses.

It therefore followed that the Hayneses had no status in this lawsuit, had no cause of action against the Hawkeye Security Insurance Company, and did not have an equitable lien on the claim of Linder against the Hawkeye Security Insurance Company.

In the instant case we hold that Linder's action against Hawkeye Security Insurance Company was in tort; that Linder's rights against Hawkeye Security Insurance Company, whatever they may have been, did not vest Haynes with an enforceable right against Hawkeye Security Insurance Company and were not assignable, prior to judgment, to Haynes. It therefore follows, and we hold, that Haynes did not have an equitable lien upon Linder's "cause of action" against Hawkeye Security Insurance Company and did not have the right to control or forestall the disposition of Linder's claim or suit against Hawkeye Security Insurance Company.

Therefore, the chancellor in equity ruled correctly.

We do not reach the question of whether the letter of April 18, 1958, from Haynes' attorney to Hawkeye Security Insurance Company was an "offer of settlement" for the reason that even assuming but not deciding, that the said letter was an offer of settlement, it does not alter nor enlarge the right of Haynes to maintain this action against Hawkeye Security Insurance Company. The construction of the letter could have had an important bearing on the insured's (Linder's) claim against his insurer (Hawkeye Security Insurance Company), but it is not a decisive factor in Haynes' claim against Hawkeye Security Insurance Company.

We hold that plaintiff Linder had a right to settle his claim against defendant Hawkeye Security Insurance Company which Linder exercised and for which Linder was paid a valuable consideration by Hawkeye Security Insurance Company. The consideration moving from Linder to Hawkeye Security Insurance Company was the dismissal with prejudice of Linder's claim against Hawkeye Security Insurance Company, and the termination of that litigation. Haynes was not a party to this settlement or this dismissal, and the language of the stipulation for dismissal wherein it provided that the dismissal shall not operate as a dismissal of Haynes' cross claim against Hawkeye Security Insurance Company was surplusage. Neither Linder nor Hawkeye Security Insurance Company had the power or right to dismiss Haynes' claim against Hawkeye Security Insurance Company, but Linder did have the right to dismiss his own claim against Hawkeye Security Insurance Company and Haynes had no right to forestall or prevent that settlement and consequent dismissal.

In the present rules of civil procedure, Supreme Court Rule 67.01 reads as follows: "A plaintiff shall be allowed to dismiss his action without prejudice at any time before the same is finally submitted to the jury, or to the court sitting as a jury or to the court, and not afterward." In the case of Pierson v. Allen, 409 S.W.2d 127, 130, we said, quoting from 83 C.J.S. Stipulations, Section 1, page 2, "A stipulation is an agreement between counsel with respect to business before a court, and is not one of the usual pleadings, but is a proceeding in the cause and as such is under the supervision of the court. They are controlling and conclusive, and courts are bound to enforce them." We further decided that a stipulation should be interpreted in view of the result which the parties were attempting to accomplish. In the instant case it was clear

that Clifford Eugene Linder intended his cause of action against the Hawkeye Security Insurance Company was to be dismissed with prejudice. He had the right to do this pursuant to Rule 67.01 of the Rules of Civil Procedure. It was further clear from the stipulation that his dismissal of his claim against the Hawkeye Security Insurance Company was not to operate as a dismissal of the cross claim of defendant Haynes. The language in the stipulation was clear and concise and set forth clearly what the parties were attempting to accomplish. It was after the case was reopened and while reopened the stipulation for dismissal was reoffered. If plaintiff is entitled to dismiss his cause of action without prejudice, it necessarily follows that he is entitled to dismiss the same cause of action with prejudice. Such a dismissal is binding on the plaintiff (Linder). If the plaintiff wants to dismiss his lawsuit at any time prior to a verdict he has the right to do so and here he did so. Therefore, the chancellor in equity was correct in so ruling.

Finding no error in the findings and judgment of the trial court, the judgment is affirmed.

James Ruddy, Special Judge

Donnelly, P. J. and
Morgan, J., concur
Finch, J., not sitting

APPENDIX H

Section 379.195, Revised Statutes of Missouri, 1969

379.195. Accident insurance liability fixed, when—cancellation prohibited.—1. In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or dam-

age on account of the bodily injury or death or damage to property by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid, occasioned by said casualty.

2. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

APPENDIX I

Section 428.020, Revised Statutes of Missouri, 1969

428.020. Conveyances to defraud creditors, void.—Every conveyance or assignment in writing, or otherwise, of any estate or interest in lands, or in goods and chattels, or in things in action, or of any rents and profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity issuing out of them, shall be from henceforth deemed and taken, as against said creditors and purchasers, prior and subsequent, to be clearly and utterly void.